

THE ALBERTA ENERGY AND UTILITIES BOARD

GENERAL BULLETIN GB 2003-16

GAS PRODUCTION IN OIL SANDS AREAS

SUBMISSION OF

BP CANADA ENERGY COMPANY

June 26, 2003

SUBMISSION OF BP CANADA ENERGY COMPANY

RE: GENERAL BULLETIN GB 2003-16 GAS PRODUCTION IN OIL SANDS AREAS

Introduction

1. By General Bulletin GB 2003-16 the Board provided a description of the policy it is proposing to implement and indicated it is prepared to receive further submissions from interested parties with respect to the establishment of that proposed policy.
2. BP Canada Energy Company ("BP Canada") makes this response to that invitation and specifically for purposes of commenting on the Board's proposal to shut-in gas in the Wabiskaw-McMurray formation of the Athabasca Oil Sands area.
3. The extremely short timeframe for response and the limited information made available by the Board as to the substantive basis for its proposed policy positions means that no meaningful consultation can occur with respect to the substance or merit of the Board's proposed policy. BP Canada believes it is, as a result, forced by the Board to the position of defending, as best it is able, its rights and its business interest.

BP Canada's Interest and Position

4. BP Canada has a significant interest in unexplored and developed petroleum and natural gas rights, wells, pipelines, plants and gas production facilities within the Area of Concern identified on the map attached to GB 2003-16. All of those rights are placed in jeopardy by the Board's proposed policy and will be precluded or seriously impaired if the policy proposed by the Board is effected.
5. Within the Area of Concern there are 102 BP Canada wells in the Kirby and Leismer Fields that are producing from the Wabiskaw-McMurray and 19 of these wells are dually completed with other zones.
6. If BP Canada is required to shut-in its total production from the Area of Concern on August 1, 2003, the production loss to BP Canada will be significant, being in the order of 65 mmcf/d or 10% of BP Canada's total Canadian production. Unless the duration of the shut-in is limited or mitigation measures are otherwise established by the Board or the

Alberta Government, BP Canada will, notwithstanding this loss of production and associated loss of revenue, continue to be burdened with responsibility and liability for all shut-in wells of which it is the licensee, including the requisite financial obligations associated with on-going staffing, maintenance, associated facilities, invested capital and related contract obligations.

7. BP Canada is concerned that the identification of an Area of Concern by the Board without disclosure by the Board of any information or reason as to the manner in which that area was delineated by the Board is not a reasonable or proper exercise of discretion and authority and as such does not constitute a reasonable justification to deprive BP Canada of its lawful business and investment. BP Canada believes its rights as a corporate citizen, responsible employer and member of the Alberta community should prevent it from being deprived of its lawful rights and property without due process or compensation.
8. In this submission BP Canada wishes to raise comments with respect to:
 - (a) the policy proposed by GB 2003-16;
 - (b) the need for immediate action;
 - (c) the rationale for the proposed policy;
 - (d) the objective and substance of the proposed policy;
 - (e) the implementation of the proposed policy;
 - (f) the effective date proposed for the policy; and
 - (g) conclusions and recommendations.

The Policy Proposed by GB 2003-16

9. GB 2003-16 indicates the Board intends to establish a policy to deal with conservation in the context of gas production in the Athabasca Oil Sands Deposit.
10. It appears to BP Canada that the policy has, notwithstanding this invitation to comment, already been substantially determined and implemented. The Board has purported to make rule changes that are to be effective beyond the New Application Area or what the

Board has referred to in the proposed policy as the Area of Concern. In this area the Board appears to believe, notwithstanding the existence of a regulation to the contrary¹ and the absence of any exemptions granted to specific wells, that it has already implemented that portion of the policy which establishes that applications for approval to produce gas will no longer be required.

11. The Board appears to have also determined and established that grandfathered wells located outside the Area of Concern will continue to be subject to applications and expressions of local concern raised by either oil sands leaseholders, or by the Board on its own initiative which, effectively, is a continuation of the policy currently set out in ID 99-1.
12. In a corresponding fashion, it appears the Board believes the boundaries of the Area of Concern have also been established and implemented. This suggests the Board is not seeking consultative input from interested parties as to any specific well or as to whether the boundaries of the Area of Concern have been established on reasonable grounds.
13. It appears to BP Canada that the benefit of certainty contemplated by the Board's proposed policy is to be effected by creating a prohibition, within the Area of Concern, with respect to activities that are presently proper and lawful and are already subject to regulatory oversight by application, complaint or on the Board's own initiative.
14. The as yet unimplemented policy proposals in respect of which the Board has invited comment thus appear to relate to the Board's intention to:
 - Effective August 1, 2003, shut-in all gas production from the Wabiskaw-McMurray within the newly established Area of Concern; and
 - Complete a future detailed review of that shut-in gas production within the Area of Concern to determine whether the shut-in was actually justified or necessary.

¹ The Oil and Gas Conservation Regulations (AR 151/71, as amended by AR 47/99) provides:

3.011 No person shall produce gas from a well completed in the oil sands strata prior to obtaining an approval from the Board in accordance with section 3 of the Oil Sands Conservation Regulation (AR 76/88), unless the Board has exempted the well from the application of this section. (Emphasis added).

The Need for Immediate Action

15. The Board's Policy Summary indicates the premise for the proposed policy is that: "Immediate action is required to mitigate further risk to thermal bitumen recovery."
16. Although the Board may believe there exists a reason for immediate action, BP Canada is concerned about the Board's subjective characterization and disinclination to share with interested and affected parties any specific information or technical assessments that the Board may have made and that have encouraged the Board to the conclusion that immediate action is necessary. The determination that immediate action is warranted appears to have been made since the March 18, 2003 date of Board Decision 2003-023.
17. BP Canada is additionally concerned that the Board's management of its gas/bitumen concern, over the past six years, has not been and is not consistent with the present determination that either immediate or arbitrary action is necessary.
18. The concern the Board has identified with respect to gas production in oil sands areas was first raised with the Board in 1996. At that time, the issue gave rise to the Gas Bitumen Inquiry following which the Board determined the issue to be one that could most appropriately be handled in the context of a regulatory process established by the Board. The Board noted, though, it would if required, seek additional legislative authority should its general authority be considered inadequate.²
19. If that regulatory process as established by the Board is, indeed, inadequate, BP Canada, in the context of real and material urgency, would have expected that the Board would have sought the additional legislative authority required to effect the legislative prohibition now proposed.
20. The Board's proposed policy, if implemented, will have the effect of displacing well-accepted protections against abusive and arbitrary action by the Board as a regulatory authority. It will, additionally, effectively dispossess parties like BP Canada of their otherwise legitimate rights to property and the right to lawfully conduct their business

² Gas Bitumen Inquiry Report, p. 53 indicated:

"The Board will exercise jurisdiction over concurrent production involving oil sands pursuant to its general authority and seek legislative authority should the general authority be considered inadequate".

affairs. The displacement of those rights cannot reasonably be ignored or lightly considered by the Board. The Supreme Court of Canada has made it clear that:

The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.³

21. The substance of the disclosures made by the Board as to the immediate need for the proposed policy do not substantiate the need for immediate action and *a fortiori* not so as to justify stripping parties of their legal rights without any recognition of or right to due process.
22. BP Canada is particularly concerned that if a need for immediate action does exist, it is due to the Board determining that its prior actions were not appropriate. In its 1998 Inquiry Report and subsequently, the Board determined that a regulatory rather than arbitrary legislative approach was appropriate to deal with the gas/bitumen conflict issue. The Board at that time specifically rejected the idea of defining a geographical area of interest as being "quite arbitrary".⁴ The currently proposed geographical Area of Concern is quite arbitrary.
23. As an appropriate approach the Board in the Gas/Bitumen Inquiry determined that in establishing a policy for gas and bitumen production,

... the Board must consider two distinct cases: currently producing gas wells and facilities developed in advance of this report and investments to be made in the future. In the first instance, gas operators drilled wells and installed facilities in good faith with the reasonable expectation that gas production would be permitted; the risk that gas production would be shut-in because of a bitumen-related conservation issue was not contemplated by the P&NG leaseholders in the oil sands areas. Therefore, although there may be some impact on future bitumen recovery, the Board will generally allow associated gas production to continue from investments made up to July 1, 1998, unless the Board receives a complaint from an oil sands leaseholder and the subsequent investigation shows continued production from existing gas wells would not be in the long term public interest.⁵

³ *City of Prince George v. Payne* (1977) 4 W.W.R. 275 (S.C.C.) at 278-279.

⁴ *Supra.*, note 2, p. 51.

⁵ *Ibid.*, p. 52 and 53.

The Board has seemingly changed its mind or determined the approach established in 1998 was not mandatory, either legally or morally. Notably, though, the Board has chosen not to share its reasoning for those inconsistent positions.

24. The issue of gas production, pressure depletion and the potential for some risk to future bitumen recovery has been known and accepted by the Board as part of the regulatory approach it devised more than five years ago. The information disclosed by the Board in the context of the currently proposed policy does not indicate what, if anything of substance, beyond what has been known to the Board for more than five years, triggered the perceived need for immediate action.
25. As recently as the Chard/Leismer proceeding conducted in 2001 and 2002 the Board heard a recommendation for the establishment of a "no fly zone" or in substance, the policy the Board is now proposing to implement. In its Decision 2003-023, dated March 2003, that no fly zone concept which would have reduced "... the risk to bitumen to zero or near zero by a blanket prohibition of new and existing gas production ..." was not seriously considered.⁶ To the contrary, the Board, in that Decision, confirmed that the regulatory approach it devised and established in 1998 continued to be appropriate to ensure that potentially at-risk bitumen is not jeopardized.⁷ The view of the Board that immediate action is now necessary and that the regulatory approach is no longer appropriate seems to represent a rather ad hoc and arbitrary reversal of the considered conclusion set out in Decision 2003-023.
26. In this context, it is significant to note the "conservation concern" that the Board has characterized as presenting an unacceptable risk to future thermal bitumen recovery may be a concern but has not, to date, been shown to be a factual issue other than in a numerical simulation model. Although the Board has accepted the potential for the issue to materialize as a real issue in the future, a significant body of expertise in Alberta has disputed both the potential for and the significance of the concern.

⁶ Decision 2003-023 at 37.

⁷ Ibid.

27. The risk the Board is seeking to mitigate is, in substance, not intended to control any known or actual conservation problem, but rather is an attempt to provide a level of insurance against an uncertain and potentially negative future from materializing. Whether the risk the Board is concerned about would materialize, absent intervention by the Board, either as to the extent of a serious risk or at all, has not been conclusively established.
28. BP Canada does not, in this submission, raise these points to further debate the reasonableness of the Board's beliefs, the Board's right to change its mind, its right to subjectively escalate the level of its concerns, or its right to embark on different courses of regulatory intervention where the processes established by the Board, over the past five years have proven ineffective to the Board's satisfaction. BP Canada believes these points do contest the reasonableness of the notion that subjective and arbitrary views of the Board should be considered appropriate or adequate to justify immediate unilateral action, the result of which will be the shut-in of all gas within the prescribed Area of Concern whether associated with potentially recoverable bitumen or not. The fact the Board did not earlier choose the course it now deems necessary cannot now reasonably justify an arbitrarily established prohibition.
29. In BP Canada's view, the need for and implementation of immediate action is not and should not be as simple as the Board deeming it to be so and proceeding with implementation. If, on the other hand, the Board is worried that circumstances really do exist that the Board considers should justify immediate and substantive action that will significantly impact substantive rights, the Board has been provided with recourse to proper legal avenues through its legislation to ensure objectives that it and the Government might perceive to be immediately necessary can be achieved.⁸

The Rationale for the Proposed Policy

30. As rationale for its proposed new policy, the Board notes that it has conducted two significant hearings within the Area of Concern (Surmont and Chard/Leismer), where it indicates some grandfathered wells were addressed in response to concerns raised by

⁸ *Infra.*, note 10.

interested parties. Notably those two significant hearings were held by the Board because the actions proposed or contemplated by the Board, which was the potential for a shut-in or refusal of approval to produce gas wells, for contested conservation reasons, was required of the Board by law.

31. On the basis of the assessments made, in the context of Chard/Leismer, the Board determined after hearing evidence and the positions of interested parties that certain wells should be shut-in. By using the vehicle of the proposed policy a similar, albeit, blanket shut-in is now proposed for wells in other areas. The rationale for that blanket shut-in is the same rationale that led the Board, in Decision 2003-023, to order wells to be shut-in except the Board now proposes to avoid the burden of being required to act reasonably, or decide on the basis of substantive evidence or in accordance with requirements of due process. That rationale is, in BP Canada's view, inappropriate.
32. The Board's policy discussion acknowledges the blanket shut-in will result in some gas production being shut-in unnecessarily. By drawing a correlation to Decision 2003-023, which the Board suggests is appropriate, it appears that as much as half the gas production the Board proposes to shut-in by the proposed policy, might be found on investigation to be non-associated gas.
33. In Decision 2003-023, the Board purported to establish a set of geological criteria the Board believed to be sufficiently clear and precise so as to establish to the Board's satisfaction whether gas in the vicinity of oil sands is associated gas or not.
34. If the Board has confidence in the geological criteria described in Decision 2003-023, BP Canada would have expected the Board to have determined some time ago that it was appropriate to proceed expeditiously and probably co-operatively to identify those same criteria for other areas of concern.
35. Although the Board may now have unilaterally concluded that bitumen conservation cannot be effectively addressed in the Area of Concern using the existing hearing process for grandfathered production, there is little objective evidence of the Board's efforts at attempting to otherwise attain its objective through a reasonable assessment. In any

event, BP Canada does not accept that the Board is entitled to just ignore and circumvent due process requirements imposed by law simply for the reason that doing so leads to more expedient results.

36. BP Canada understands the Board's concerns and objectives but believes, as a tribunal exercising a statutory mandate, the Board is not entitled to arbitrarily override legal rights in favour of achieving a more expedient result. If action is required such that it is necessary to prohibit otherwise lawful activity and displace embedded and established legal rights such action should be effected by a legislature that is answerable and responsible to the Alberta electorate.
37. BP Canada's concern is exacerbated by the fact that the rationale for the Board's intention to shut-in BP Canada's gas wells has not been reasonably or properly explained and that the Board has not disclosed, other than in broad generalities, the basis on which it has made either its present or its past determinations. The Board has not provided BP Canada with any information with which to assess and understand whether or not the extrapolations made by the Board from past decisions are reasonable or even whether they are founded on any substantive evidence.
38. In its past decisions, on which the Board seeks to draw a correlation, the Board has withheld details of its reasoning, information relied upon and the basis for its interpretations. In Decision 2003-023, for example, the Board narrowed the issue to that of the existence of associated gas, which issue can only be determined by the Board and the interpretations derived from its geological "black box", to which interested parties have not been provided access.
39. It is of significant concern to BP Canada that the Board appears to be of the view that only it or its staff has the geologic acumen to make the assessments and determinations the Board now considers to be necessary.
40. As the Board is aware, BP Canada has sought leave to appeal Decision 2003-023 on the grounds that the Board's reasons do not disclose what, if any, evidence was considered by it in making its assessment of the BP Canada wells in issue in that proceeding. In that

Decision the Board created a map, without identifying the basis or the evidence relied upon by it for its preparation. That map showed the Board's interpretation of the location of areas of erosion of McMurray A and B mudstones (Figure 8 at page 55) which appears to constitute much of the objective for the geological review the Board is now proposing for the Area of Concern. Whether, and the extent to which any hearing evidence was relied upon by the Board for its conclusions is not disclosed by Decision 2003-023. The Board's approach and conduct has, as a result, made it impossible for BP Canada to correlate or to draw any of the conclusions the Board has apparently reached with respect to the Chard/Leismer area and more particularly, has denied it the opportunity to draw correlations to other areas of the Athabasca Oil Sands Deposit, including the Area of Concern now identified by the Board.

Proposed Detailed Review

41. The proposed policy indicates the Board intends to undertake "a detailed review of shut-in gas production within the Area of Concern" and that the completion of that geological work will be a priority for the Board.
42. BP Canada questions the nature of this priority given the extensive period of time that has elapsed since this issue first arose. BP Canada is additionally concerned that the "geological work" contemplated by the Board is undefined in its content, scope and intended objective.
43. BP Canada is concerned with the Board's proposal that its rights need to be constrained and held in abeyance, without substantive reason, in order to allow the Board to make a detailed assessment of shut-in gas production without any parameters as to substance and timing of the review.
44. It is unreasonable that BP Canada's rights, opportunities and investment should be held to ransom in order to allow investigative work by the Board that might take years or decades to complete to the Board's satisfaction.
45. Of additional concern to BP Canada is that the Board seemingly neither intends nor proposes to provide any reasonable or material opportunity for adversely affected parties

to influence either the timing or substance of the Board's proposed assessment. It appears the Board is intent on maintaining an exclusive and private control over all matters relating to the gas/bitumen conservation concern. This has the effect of precluding BP Canada from any opportunity to minimize the consequences to it of the Board's proposed policy.

46. Given the seriousness of the consequences of the Board's proposed policy approach to BP Canada's rights and property, the Board, at minimum, should have acknowledged responsibility for the establishment of a firm work plan and a defined work period. The rationale for the Board's proposed policy combined with the open-ended, arbitrary approach proposed by the Board is unreasonable and unfair.

The Objective and Substance of the Proposed Policy

47. BP Canada wishes to be clear that it understands it has not been invited or provided any reasonable opportunity to make representations as to the merit of the conservation concern the Board has embraced. This submission is limited to addressing the approach to the shut-in gas objective sought by the Board.
48. In BP Canada's view there are reasonable, responsible and legal means available to the Board to ensure that the Alberta public interest is satisfied. Among BP Canada's reasons for objection, it does not accept as reasonable that the end sought by the proposed policy should alone be taken as justification for the means. The Board's policy proposal notes that to properly identify non-associated gas requires the development of a regional geological model which work requires more time than the Board considers to be available. It is clear, however, that if the Board is unable to identify non-associated gas, it is equally unable to identify associated gas. It is, of course, only associated gas that is at the heart of the Board's concern.
49. BP Canada finds it disconcerting that the Board has had an extensive period of time to consider the issue and to work with government, if it wished to do so, on the development of a comprehensive policy. Instead it is proposing to establish a very narrow policy objective immediately and unilaterally. The Board's proposed policy does not

acknowledge or attempt to provide for any private or public interest that will be negatively impacted by the proposed curtailment of legitimate business activity. It is not clear whether the Board has not contemplated these impacts or has merely construed them as non-material in the context of its conservation concern.

50. BP Canada finds it particularly disappointing that in the more than six-year history of the gas over bitumen issue the Board has maintained a single minded focus with respect to its conservation mandate, which the Board describes as obligatory, while it has during the same period been reluctant to make any reasonable consideration of its other corresponding and related mandates, which are no less obligatory, including the requirement:

- (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;
- (d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;⁹

51. The Board's reluctance to investigate and assess all aspects of the energy-related concern raised by the gas/bitumen issue is itself of serious concern. To the extent consequential and related issues have not been addressed because they might be considered to be beyond the Board's purview to resolve, the Board has the statutory mandate to recommend to the Lieutenant Governor in Council, for implementation, any approaches or resolutions to issues as may be considered by the Board to be necessary or appropriate.¹⁰

52. Although BP Canada does not share the Board's perspective that immediate, arbitrary action is required, it appreciates that some parties, including the Board, may see such action, including action that will negatively impact property rights, business activity and

⁹ *Oil and Gas Conservation Act* R.S.A. 2000 C. 0-6, s. 4.

¹⁰ *Energy Resources Conservation Act*, R.S.A. 2000 C. E-10, provides:

21. The Board may, and at the request of the Lieutenant Governor in Council shall, at the places, at the times and in a manner it considers advisable
- (a) make inquiries and investigations and prepare studies and reports on any matter within the purview of any Act administered by it relating to energy resources and energy, and
 - (b) recommend to the Lieutenant Governor in Council any measures it considers necessary or advisable in the public interest related to the exploration for, production, development, consideration, control, transportation, transmission, use and marketing of energy resources and energy.

investment, to be necessary. The thought of such action should reasonably have generated some consideration of the other issues and concerns that the Board knows exist but that may be beyond what the Board considers to be the four corners of the conservation concern. It seems to BP Canada reasonable to expect that correlative concerns including those that are material to the Government of Alberta would have been given some consideration. It does not appear that the Board has offered or suggested to the Government of Alberta the establishment of a comprehensive, balanced or even a clear policy approach to the gas/bitumen issue. Given that the Board appears prepared to exercise its mandate only to the extent of causing gas to be shut-in, it should not be surprised to receive some push-back from parties whose rights will be impaired and whose property will be confiscated by the implementation of the Board's proposed policy.

53. The proposed policy is acknowledged by the Board to be arbitrary because a further assessment is necessary to determine whether and which, if any, wells in the Area of Concern might be assessed to be associated with recoverable bitumen. As no commitment exists that the assessment will be made at any reasonable time in the future or that any shut-in well will ever again be allowed to produce, that makes the shut-in of BP Canada's wells necessarily indefinite and in practical terms, permanent.
54. In BP Canada's view, the policy proposed by the Board is, in these circumstances, unreasonable. The Board has a mandate and a responsibility to regulate in a manner that is fair, reasonable and appropriate and in the overall public interest. That mandate is not discharged by the mere shut-in of gas wells that the Board acknowledges to be without substantive foundation, and in respect of which the Board's policy notes "will result in the shut-in of some non associated gas".
55. Aside from the merit of the objective the Board seeks to achieve by this proposed policy, it is, in BP Canada's submission, inappropriate for the Board, under the guise of establishing a policy, to establish legal mandatory obligations.¹¹ It is well established law

¹¹ The Board's proposed policy under the heading "Policy Description" indicates: "Effective August 1, 2003, all Wabiskaw-McMurray gas production from wells within the new reduced application area and within overlapping Pool Orders must be shut-in," and that: "Affected wells will be listed in a forthcoming interim direction."

that a policy can neither be used to fetter a discretion nor to create legally enforceable rights.¹²

56. BP Canada submits that because the proposed policy cannot itself have the force and effect of law, the Board will necessarily be required to effect the policy through the exercise of some other exercise of a general or specific statutory authority. Whether that is sought to be done by way of an order, directive or by regulation is a matter of form, not of substance.
57. In BP Canada's view the substance of the Board's proposed policy is contrary to law and if established would constitute an abuse of authority. This is because:
- (a) The Board's delegated statutory authority does not expressly authorize it to legislate the shut-in of wells for arbitrarily established purposes or to legislate a prohibition of otherwise legal activity. If it can be established that a conservation justification actually does exist for the shut-in of wells, that needs to be established substantively. In any event, the Board's authority does not extend to unilaterally prohibiting production from wells, simply by reason of proximity and in respect of which no conservation issue is shown to exist.
 - (b) The Board, as a statutory tribunal, is not entitled to establish mandatory legal obligations under the guise of creating a policy. In the context of establishing a legitimate policy the Board is not entitled to fetter the statutory discretion conferred upon it and *a fortiori* is not authorized to use a policy to circumvent legal, due process obligations otherwise imposed upon it by legislation.
 - (c) The Board's authority to order the shut-in of gas wells is limited by the powers expressly or implicitly granted to the Board. The exercise of a statutory power must be shown to be within the statutory grant, which necessarily requires a determination based on some substantive evidence. Any such determination by

¹² *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104, (C.A.) indicates at 109: A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case. Most importantly, ... a non-statutory instrument cannot impose mandatory requirements enforceable by sanctions; that is, the regulator cannot issue *de facto* laws disguised as guidelines.

the Board must be made in accordance with the procedural rules of fairness (notice, adequate disclosure, response and hearing) as prescribed by legislation and jurisprudence.

58. In BP Canada's submission it is equally inappropriate for the Government of Alberta to condone an approach proposed by the Board that will obliterate legitimate business ventures, corporate investment and shareholder value without any reasonable consideration being given to consequences, to reasonable fairness, to the overall cost to the industry, or to the economic and investment climate in Alberta and to the longer term implications of such arbitrary conduct.

Implementation of the Proposed Policy

59. The prohibition, which is the substance of the policy the Board proposes to establish, is not supported or sanctioned by any specific legal authority. The policy, if implemented, will materially and adversely impact business and individual property rights. Nothing in the Board's parent legislation authorizes it to effectively expropriate property rights for the public interest, and certainly not without due process.
60. In BP Canada's view, it is entirely inconsistent with the Board's authority that on the one hand, if it denies a licence to drill a well, the well licence applicant has a statutory right of appeal to the Lieutenant Governor in Council,¹³ but on the other hand the Board believes it has absolute authority to unilaterally prohibit the enjoyment of the rights granted by a well licence after it has been issued.
61. Any exercise of its statutory authority, whether by way of an order, directive or the establishment of a regulation, must be authorized by the legislation, express or implied and additionally, must necessarily be performed in a manner that accords with the rules

¹³ *Supra.*, note 5, s. 18:

(2) When the Board has refused a license, the Lieutenant Governor in Council, in the Lieutenant Governor in Council's discretion, may review the application and may direct the Board to issue the license.

of procedural fairness and at minimum in accordance with the requirements of the *Energy Resources Conservation Act* and of the *Administrative Procedures Act*.¹⁴

62. The Board's proposed policy notes as the reason for the proposed policy approach that:

Continued use of the current lengthy application and hearing process will not address grandfathered wells in time to achieve the Board's overall conservation objective.

In BP Canada's view the expediency with which the Board may seek to obtain its objectives does not confer on the Board the entitlement to circumvent the obligation to comply with due process requirements and the rules of reasonable fairness.

¹⁴ *Supra.*, note 10, s. 26 provides:

(1) Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.

(2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

(a) notice of the application,

(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,

(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,

(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and

(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

(3) When by subsection (2) a person is entitled to make representations to the Board or its examiners, the Board is not or examiners are not by subsection (2) required to afford an opportunity to the person

(a) to make oral representations, or

(b) to be represented by counsel,

if the Board or examiners afford the person an opportunity to make representations adequately in writing, unless the statutory provision authorizing the Board's decision requires that a hearing be held.

Administrative Procedures Act, R.S.A. 2002 C. A-3, provides:

4. Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

(a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,

(b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail

(i) to permit the party to understand the facts or allegations, and

(ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations, and

(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

...

8. Nothing in this Act relieves an authority from complying with any procedure to be followed by it under any other Act relating to the exercise of its statutory power.

63. The law is well established that a delegated power authorizing the regulation of an activity cannot in the absence of clear authority prohibit an activity absolutely.¹⁵
64. The energy statutes, under which the Board derives its authority, do not confer authority on the Board to unilaterally and immediately shut-in all wells within a broad and generally defined area.
65. It is equally well settled law that regulation may involve the imposition of restrictions on activities, to the extent necessary and authorized, but there is a marked distinction to be drawn between prohibition and prevention of an activity and the governance of it.¹⁶
66. The Board has conferred upon it broad powers to regulate, including the power to postpone, curtail or prevent gas production for the purposes of conservation and the prevention of waste.¹⁷ Indeed, in the context of the conservation of conventional oil the Board is expressly granted the legislative discretion to consider applications and to determine whether, when and under what circumstances, gas production may be allowed.¹⁸ The Board, by regulation, established corresponding regulatory controls in relation to the conservation of bitumen,¹⁹ which the Alberta Court of Appeal upheld as within the Board's mandate to monitor and adjudicate upon the production of gas that is in association with recoverable bitumen.²⁰
67. Consistent with the view that the Board is not authorized to prohibit gas production either unilaterally or absolutely, the Alberta Court of Appeal, in confirming the validity of regulations requiring approval of gas production in association with bitumen, noted the regulations did not direct the shut-in of all gas until further order or order that all wells be shut-in. To the contrary the Court's reasons noted that under the impugned regulations, that any shut-in would not be automatic and that interested parties must be dealt with in

¹⁵ *Virgo v. Toronto* [1896] A.C. 88 (PC) at 93 determined "... the power to regulate and govern implies the continued existence of that which is to be regulated or governed". Confirmed and adopted in *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)* [2002] A.J. No. 694.

¹⁶ *Ibid.*

¹⁷ *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, 2001 ABCA, 174, at 18.

¹⁸ *Supra.*, note 5, ss. 39(f) and 42.

¹⁹ *Supra.*, note 1 and The Oil Sands Conservation Regulations being AR 76/88, as amended by AR48/99, s. 3.

²⁰ *Supra.*, note 17, at 15.

accordance with equitable principles and the principles of natural justice and procedural fairness appropriate to all administrative proceedings.²¹

68. Whatever the process vehicle the Board may choose to adopt to effect its proposed policy, it is clear the substance of the policy is intended to automatically, without consideration of merit, without due process and with the intent of precluding judicial review, shut-in every gas well within the boundaries of an area arbitrarily established by the Board. Moreover the indeterminate duration of the shut-in will amount to an effective expropriation of the rights granted to BP Canada, for the benefit of a presumed greater public interest.
69. In BP Canada's view this renders the substance of the policy proposed to be implemented by the Board improper and illegal.
70. It is notable that virtually every party that made a submission to the Board in connection with GB 2003-12, including bitumen producers, said that the Board, at minimum, needs to meet its legal procedural obligations in connection with the fulfillment of its determination to shut-in gas production.
71. It is BP Canada's view that the law should not be subverted to any particular objective of the Board regardless of the perceived merit of that objective. If the law is inadequate to enable the objective to be achieved, in the manner sought by the Board, that is an issue the Board should more appropriately raise with the Alberta Government.

The Effective Date for the Proposed Policy

72. Assuming the Board determines to implement the proposed policy, notwithstanding the absence of jurisdiction to do so, BP Canada would request that the Board defer the effective implementation date of any shut-in order to April 1, 2004 to ensure the policy does not result in serious, unnecessary and unintended collateral effects. Further, it should not unfairly compromise the ability of adversely affected parties to seek timely judicial remedies properly available to them.

²¹ *Supra.*, note 17, at 18 and 19.

73. BP Canada believes the following substantive reasons justify a deferral of the proposed effective date:

- (a) The Board's proposed policy indicates the shut-in of gas wells within the Area of Concern is intended to apply only to the Wabiskaw-McMurray and "...that in 2002 about 50% of the gas production within the Area of Concern came from zones other than the Wabiskaw-McMurray. This gas will be allowed to continue to produce". (Emphasis added). In order to facilitate the continued production from these other zones, it will be necessary to access these wells to physically segregate the Wabiskaw-McMurray. This cannot be achieved prior to the August 1, 2003 timeframe, the Board has proposed to make the shut-in effective. The service equipment required to be contracted for this work simply will be unable to satisfy the demand due to the magnitude of the shut-in, even if immediate access were possible. More significantly, though, this is a mostly winter access area which means access by equipment to perform service work required to segregate zones cannot practically be done until after freeze up in any event.

As an affect, the proposed August 1, 2003 timing of the proposed shut-in will necessarily result in substantial volumes of gas being shut-in with corresponding problems, issues and costs for other connected surface facilities, none of which impact has been contemplated or is intended by the Board but will flow incidentally from an arbitrary and inappropriately established effective date.

Even if the Board's concern should materialize, there is no evidence and it seems to BP Canada unlikely that the incremental depressurization that will occur between August 1, 2003 and April 1, 2004 will be material in the overall context of the risk to potentially recoverable bitumen.

- (b) BP Canada understands the Board's objective and desire, but would hope that desire would be tempered by some sense of reasonableness and fairness. The proposed policy and its implementation will give rise to significant legal issues, which will obviously be contested. BP Canada would urge the Board to recognize that reality and not to seek to further defeat the legitimate legal rights of parties by

the implementation of the proposed shut-in in a time frame that would render impact mitigation impossible and resolution of the legal issues partially or wholly academic. A deferral of the effective date of the proposed shut-in to April 1, 2004 represents some balance and will assist in facilitating the determination of the legal issues in question.

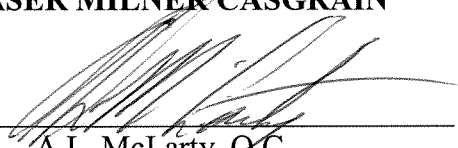
Conclusions and Recommendations

74. BP Canada believes it is entitled to reasonable notice, an opportunity to understand the case made against its interests and to respond to any such case before any exercise of statutory authority is made to limit or inhibit BP Canada from the enjoyment of its proper and legal property rights. The policy proposed by the Board is improper and illegal because it is designed purposely to circumvent and deny the procedural and process rights to which BP Canada would otherwise be entitled
75. The resource the Board seeks to protect for the future benefit of Alberta will be significantly diminished in value if the policies of the Board and of the Government of Alberta irreparably damage Alberta's investment climate and the ability of the Province of Alberta to attract the necessary investment and risk capital reasonably required, in future, to develop Alberta's resources, including the bitumen resource.
76. It is unreasonable, in the long-term interests of Alberta, and unnecessary that the objective sought to be achieved by the Board, be realized at the cost of a loss of business and investor confidence and regulatory and government credibility. If determined to be necessary, the objectives sought to be established by the Board should be effected through reasonable and legal processes.
77. In BP Canada's view compensation should be an integral component of any policy that seeks to dispossess parties of their property and legitimate business interests. The fact that neither the Board nor the Government appear to be prepared to squarely address that issue is unfair and irresponsible in the context of the impacts proposed to be imposed on investors that committed, in good faith, to the development of resources in Alberta.

78. The Board is not, and should not consider itself, an island. Nor should the Board behave as if conservation concerns and their resolution do not have associated with them other equally important public policy issues. There are extremely qualified and capable people in industry and in government that could make a significant contribution to the gas/bitumen issue if the Board was prepared to allow their input. BP Canada would encourage the Board to recognize that industry, the Government and the Board all have a material interest in Alberta's energy future.

All of which is respectfully submitted this 26th day of June 2003.

FRASER MILNER CASGRAIN



Per: A.L. McLarty, Q.C.
on behalf of BP CANADA ENERGY
COMPANY

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